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No. 88-1305

In the Supreme Court of the United States

OCTOBER TERM, 1988

ASHLEY TRANSFER & STORAGE CO., INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' acquittal on a charge of Sherman Act conspiracy collaterally estops the government from prosecuting petitioners on a charge of conspiracy to defraud the United States that was brought to trial together with the Sherman Act conspiracy count but was erroneously dismissed at petitioners' request.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 858 F.2d 221.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1988. A petition for rehearing was denied on November 16, 1988 (Pet. App. A27-A28). The petition for a writ of certiorari was filed on January 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On June 9, 1987, a federal grand jury sitting in the District of South Carolina indicted petitioners and a co-defendant (now deceased) on one count of conspiracy in restraint of trade, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1 (Count I), and one count of conspiracy to defraud the government, in violation of 18 U.S.C. 371 (Count II). Before trial, petitioners all joined in a "motion to elect," in which they argued that the counts were multiplicitous. The district court deferred ruling on the motion, but at the close of the evidence the court stated that it would not charge the jury on Count II. The jury, which was charged only on Count I, returned verdicts of not guilty as to all defendants. The district court then entered judgments of acquittal on Count I and dismissal on Count II. The court of appeals vacated the judgments of dismissal as to all defendants and remanded for a new trial on Count II.

1. Petitioners were engaged in the business of providing storage of household goods for military personnel and their families. They performed that service under contract with the government at three military bases near Charleston, South Carolina. Both counts of the indictment alleged that petitioners engaged in a conspiracy from February 1978 until the date of the indictment to fix the prices for military storage services. C.A. App. 16-30. Count I alleged that petitioners' storage services were in and affected interstate commerce (*id.* at 21), a necessary element of a Sherman Act violation. Count II incorporated by reference the terms of the conspiracy as set forth in Count I but also alleged the elements of fraud on the government, interference with the governmental functions of the Military Traffic Management Command, and overt acts committed in furtherance of the conspiracy. *Id.* at 22-30.

At trial, three witnesses testified about meetings attended by moving company representatives, including the individual petitioners, at which storage prices were fixed. David Barnette, the assistant manager of M&M Transfer, testified about one meeting at M&M's warehouse in the first half of 1978 at which the participants agreed to raise their rates from $8.60 to $12 per 100 pounds; one firm was to raise its rates first, and the others were to follow. I Tr. 46-57. Ralph Finnicum, the vice president of petitioner Dale J. Cook Moving and Storage, Inc. (Cook Inc.), who prepared Cook Inc.'s rate increase letter, confirmed the meeting at M&M's warehouse. II-A Tr. 239-245. The rates were raised accordingly: one firm increased its rates effective May 1, 1978, the two petitioner firms raised their rates effective July 1, and all of the other putatively competing firms rates their rates between July and November.

Barnette also testified about a meeting in the summer of 1979 at which the movers' representatives agreed to another rate increase; because of concern about an investigation in Columbia, South Carolina, they did not fix a new rate at that meeting but agreed that Ashley Transfer and Cook Inc. would file initial increases that the others would follow. I Tr. 58-62. Benny McMillan, a manager for Nilson Van & Storage, testified about a similar meeting in the summer of 1979, attended by petitioners Bivens and Cook and their deceased co-defendant, Raymond Harshaw, who was vice-president of Ashley Transfer. II Tr. 150-154. Ashley Transfer and Cook Inc. in fact raised their rates to $16.50 per 100 pounds effective September 1, 1979, by letters sent only four days apart, on July 9 and 13, 1979. I-A Tr. 174; II-A Tr. 225; III Tr. 230-231. About the same time, however, the government imposed a freeze on rate changes from August 15 to December 1, 1979, which "messed up" further implementation of the agreement. I Tr. 74-76, 116-117; GX B-4.

John Meeks, the president of M&M, testified that when the others failed to follow the initial rate increases in December, he talked with Harshaw, petitioner Bivens, and "probably" others, and that Bivens agreed to raise his company's rates first. II Tr. 175-177, 182-183. Bivens then filed a rate increase letter on December 17, 1979, and M&M, Nilson, and five other carriers followed with their own rate increases a month later. I-A Tr. 174-175; II-A Tr. 271-272; GX A-1. The following summer Barnette was asked, in his capacity as a member of the Rates and Tariffs Committee of the Charleston Movers Association, to check on whether every mover had raised its military storage rates. After obtaining the necessary information from the government, he reported back that "there was a discrepancy in the zone two rates." I Tr. 80-82. When Harshaw complained, noting that he had been hurt as an "initial filer" because everyone else was so slow to file, Barnette called the mover with the low rates to tell him "there were some people who were not happy" because his rates were not in line. I Tr. 82.

To show that petitioners' conduct was subject to the Sherman Act because it was in or affected interstate commerce, the government relied primarily on testimony that storage is an integral part of the overseas transfer of military personnel, and that restraints on storage could result in a freeze on such transfers. IV-A Tr. 373-375. Beyond that, the government introduced only brief testimony that most of the property is shipped directly out of state when it is taken out of storage (I Tr. 39), and records stipulated into evidence without live testimony showing that the defendants purchased substantial amounts of storage equipment from out of state (GXs H-1, I-1, J-1, K-1, L-1, M-1, N-1, admitted at III-A Tr. 319-323).

To show that the conspiracy was intended to and did defraud the government, the government introduced certificates of independent price determination submitted by Ashley Transfer, Cook Inc. (including one signed by petitioner Cook), and M&M Transfer (I Tr. 73-74; II-A Tr. 237-238, 256), together with evidence that the government had paid the storage companies in the Charleston area more than $4.3 million during the period of the conspiracy (III-A Tr. 326-327).

2. At the end of the government's case and again at the close of the evidence, the district court rejected petitioners' motions for judgments of acquittal. The court explicitly found that, "considering the evidence in the light most favorable to the Government, they have proven that there was a conspiracy and that all of these defendants were in it" (C.A. App. 60), and that the government had introduced "believable, credible evidence that * * * would support a conviction of * * * all of the Defendants to the charges contained in the indictment" (IV-A Tr. 381). The court noted, however, that "we've still got open the Motion of the Defendants to Require the Government to Elect." The court ruled that it would not submit both counts to the jury because, whether the law permitted it to do so or not, the court would not sentence the defendants on both. C.A. App. 61-62. The court held that it would charge the jury only on the Sherman Act count, stating: "I think they committed one crime, and they should be tried for that one crime, and if they are convicted, they should be punished for that one crime. And I don't think we ought to double dip them, and I am not going to do it." *Id.* at 67-68.

Accordingly, the court charged the jury only on the Sherman Act count, and it instructed the jury to ignore prior references to a second count. IV Tr. 273; C.A. App.

87-88. The following day, the jury requested supplemental instructions on both the conspiracy and the interstate commerce issues. C.A. App. 111-112, 115. In both sets of instructions, the court charged that the government must show a restraint on the flow of "goods or services"; the court inadvertently omitted any reference to the movement of people as an element of commerce, although it had agreed to charge on that issue. *Id.* at 71-73, 101-103, 126-130. The jury returned a verdict of not guilty (*id.* at 131), and the court issued judgments acquitting the defendants on the Sherman Act count and dismissing the count charging conspiracy to defraud the government (*id.* at 134-138).

3. The government appealed the judgment dismissing the second count. The court of appeals held that the Sherman Act and fraud charges were not multiplicitous, that petitioners had shown no prejudice arising from joinder of the two offenses for trial, and that, in the absence of any such showing of prejudice, "the district court's refusal to submit count II to the jury and the subsequent dismissal of count II was an unauthorized intrusion upon the prerogative of the government to seek an adjudication of guilt on each count." Pet. App. A7-A12.

The court of appeals also ruled that there was no bar under the Double Jeopardy Clause to a retrial of Count II. The court rejected two distinct contentions that petitioners had advanced in an effort to bar a retrial. First, the court held that the prior proceedings on Count II itself did not bar a retrial. The court observed that petitioners themselves had induced the trial court to dismiss Count II on a basis unrelated to their guilt or innocence by filing their motion for election. Thus, under *United States* v. *Scott*, 437 U.S. 82 (1978), and *Jeffers* v. *United States*, 432 U.S. 137, 150-154 (1977), retrial on Count II would not constitute double jeopardy on that count. Pet. App. A12-A17.

Second, the court held that the jury's verdict of acquittal on Count I did not bar a trial on Count II under the doctrine of collateral estoppel. The court agreed with petitioners that, despite the possibility that the acquittal on Count I could have been based on the jury's belief that the government had not adequately proved the interstate commerce element of Sherman Act conspiracy, the record showed that the jury must instead have concluded that no conspiracy existed. Pet. App. A20-A24. But the court held that the no-conspiracy finding could not be given collateral estoppel effect because, as this Court stated in *Ohio* v. *Johnson*, 467 U.S. 493, 500 n.9 (1984), "where the government has made no effort to prosecute the charges seriatim, the 'considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable.' " Pet. App. A25.

ARGUMENT

In this Court, petitioners contend only that the acquittal on Count I bars a trial of Count II under principles of collateral estoppel. The decision of the court of appeals rejecting that contention, however, fully comports with the decisions of this Court and does not conflict with any decision of another court of appeals. Moreover, the judgment of the court of appeals is correct for another reason on which that court did not rely, namely, that the jury did not necessarily determine that the government failed to prove the existence of a conspiracy. Review by this Court therefore is not warranted.

1. Petitioners advance separate contentions that the decision below conflicts with a decision of this Court (Pet. 10-13) and that it conflicts with decisions of three other courts (Pet. 13-16). Neither contention is accurate.

a. Far from conflicting with the decision below, this Court's decisions strongly support it. In *Ohio* v. *Johnson, supra*, the defendant, like petitioners here, had persuaded the trial court to dismiss certain charges. When the dismissal was found erroneous, the defendant argued that collateral estoppel (stemming from an alleged "implied acquittal" inherent in his conviction for lesser included offenses) barred the State from securing a retrial on the charges dismissed. This Court disagreed, observing that "in a case such as this, where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." 467 U.S. at 500 n.9. That principle directly controls this case, and petitioners do not contend otherwise. Rather, despite the explicit reliance by the court of appeals on *Ohio* v. *Johnson* (Pet. App. A25), petitioners ignore that case and assert that the decision of the court of appeals is "inexplicabl[e]" (Pet. 11).

Petitioners assert that there is a direct conflict between the decision below and *Ashe* v. *Swenson*, 397 U.S. 436 (1970), but that is plainly not so. In *Ashe*, the State deliberately sought to try the defendant seriatim on seven informations (one for each victim and one for theft of the getaway car) arising from a single robbery of a group of six poker players. 397 U.S. at 457 (Brennan, J., concurring). In the Court's view, the State "treated the first trial"—which resulted in an acquittal—"as no more than a dry run for the second prosecution," *id.* at 447, which would enable the State to firm up its initial "weak[]" identification testimony. *Id.* at 438-440. It was the State, not the trial court or the defendant, that was responsible for dividing the case into separate trials, and it was in that context that the Court held that the Double Jeopardy Clause would not permit the State to relitigate a question

that had been resolved against it in the first of several trials that would all focus on the same issue.

Ashe v. *Swenson* would be controlling here only if in *Ashe* the State had sought to try all of the charges in a single proceeding but the trial court, at the defendant's request, had dismissed one or more of the charges. But those were not the facts of *Ashe*, and the Court's opinion does not suggest how the Court would have decided that case. The only case in which this Court has addressed such a fact pattern is *Ohio* v. *Johnson*, and that case supports the government's position, not petitioners'.

b. Petitioners also allege a conflict among the lower courts because, they assert, the court of appeals "has decided that the doctrine of collateral estoppel * * * does not apply to multi-count indictments." Pet. 14. Although such a holding might well be a proper construction of the Double Jeopardy Clause, particularly in light of *Ohio* v. *Johnson* and *United States* v. *Powell*, 469 U.S. 57, 68 (1984), no such broad holding was necessary in order to decide this case. Rather, the decision of the court of appeals rests on the much narrower holding that, "[w]here, as in this case, the defendant's choice [the successful 'motion to elect'] and not government oppression caused the successive prosecutions, the defendants may not assert collateral estoppel as a bar against the government." Pet. App. A25.

Collateral estoppel is an aspect of the Double Jeopardy Clause. See *Ashe* v. *Swenson, supra.* The distinction between successive prosecutions brought about by the defendant's voluntary actions and successive prosecutions that are beyond the defendant's control is therefore an important one. See *Jeffers* v. *United States*, 432 U.S. 137, 152 (1977) (plurality opinion) (Double Jeopardy Clause no bar to successive prosecutions for greater and lesser included offenses when defendant "elects to have the two offenses

tried separately and persuades the trial court to honor his election"); *United States* v. *Scott*, 437 U.S. 82, 98-99 (1978) (government not barred by Double Jeopardy Clause from retrying defendant when defendant elects to seek midtrial dismissal on grounds unrelated to guilt or innocence); *United States* v. *Dinitz*, 424 U.S. 600, 606-607 (1976) (defendant may be retried after a mistrial, even if there was no "manifest necessity" for the mistrial, if the mistrial was declared at the defendant's request); see also *Ricketts* v. *Adamson*, 483 U.S. 1 (1987).

In light of that distinction, it is clear that the decision of the court of appeals does not conflict with *United States* v. *Bowman*, 609 F.2d 12, 17-18 (D.C. Cir. 1979); *United States* v. *Mespoulede*, 597 F.2d 329, 336-337 (2d Cir. 1979); or *United States* v. *Felder*, 548 A.2d 57, 66 (D.C. 1988). Each of those cases involved the retrial of one count of a multicount indictment that had been submitted to the jury in full but had resulted in an acquittal on one or more counts and a hung jury on other counts. Thus, in none of those cases was it the defendant's voluntary choice that gave rise to the need for a second trial. Here, by contrast, it was the defendants' "motion to elect," which the trial court erroneously granted, that necessitated a second prosecution. Nothing in *Bowman, Mespoulede,* or *Felder* would preclude the courts that decided those cases from reaching the same result that was reached in this case if the situation presented in this case came before them.*

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* Indeed, the Second Circuit (which decided *Mespoulede*) and the District of Columbia Court of Appeals (which decided *Felder*) have recognized that the question whether collateral estoppel applies in a particular case involving a multicount indictment is far more complex than the simple issue that petitioners frame. Each court has declined to apply collateral estoppel in some such situations. See *United States* v. *Citron*, 853 F.2d 1055, 1058-1059 (2d Cir. 1988); *United States* v. *Smith*, 337 A.2d 499, 501-503 (D.C. 1975).

In *Bowman, Mespoulede,* and *Felder* the government had a full and fair opportunity to convince the juries of the defendants' guilt on the counts the courts later found precluded. In this case, as in *Jeffers* and *Scott,* the government was deprived of that opportunity on petitioners' own motion. And, had both counts been sent to the jury originally, the jury might have convicted petitioners of defrauding the government at the same time it acquitted them on the Sherman Act count, as the jury did in *United States* v. *Walker*, 653 F.2d 1343 (9th Cir. 1981), cert. denied, 455 U.S. 908 (1982). In short, petitioners, who elected to take one of the two counts away from the first jury, "ha[ve] not been 'deprived' of [their] valued right to go to the first jury; only the public has been deprived of its valued right to 'one complete opportunity to convict those who have violated its laws.' " *Scott,* 437 U.S. at 100 (quoting *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978)); see also *Standefer* v. *United States*, 447 U.S. 10, 22-23, 25 (1980).

2. In any event, the judgment of the court of appeals would be correct even if petitioners were right in contending that this case should be analyzed just as if the government had brought the Sherman Act charge separately from the fraud charge. Although the court of appeals concluded that the jury in this case must have found that petitioners did not engage in the conspiracy alleged (Pet. App. A20-A24), that conclusion is not sound. The court reached that conclusion by a process of elimination. It excluded the possibility that the jury found no effect on interstate commerce because the government introduced substantial evidence on that issue, and the defendants did not contest it. The court, however, overlooked the fact that the major part of the government's evidence and argument on this point related to the effect of the alleged conspiracy on the movement of military personnel (IV-A Tr. 373-375; IV Tr.

302-303). That entire line of proof was rendered ineffective by the district court's inadvertent failure to charge the jury that the movement of people is an element of commerce (C.A. App. 71-73, 101-102, 126-130). The remainder of the testimony, exhibits (stacks of checks and invoices stipulated into evidence), and argument on the issue were presented to the jury in such a cursory manner (I Tr. 39; IV Tr. 303-304) that their significance may well have been lost on lay jurors. Moreover, although petitioners did not contest the issue, the government had the burden of proof on it, and the jury obviously did not believe that petitioners had conceded the interstate commerce issue away because it asked the court for supplemental instructions on the point. C.A. App. 111-112, 115.

As the case stands, therefore, the question is whether the jury must have rejected the government's eyewitness testimony of conspiracy, challenged on grounds of credibility, rather than its proof of interstate commerce, undermined as it was by faulty jury instructions. We submit that, although the existence of an effect on interstate commerce may be obvious to the trained lawyer, the record here shows that it was not so clear to the jury. The lack of dispute on an issue may ordinarily be a reliable indicator that a jury could not rationally have based its decision on that issue, but in the peculiar circumstances of this case that may not be so. Thus, the decision to remand this case for a new trial on Count II is correct not only on the ground set forth by the court of appeals, but also because petitioners have not carried their burden of showing that the jury necessarily decided the conspiracy issue in their favor.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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